he asked him the reason for his refusal to sign the copy he replied that he could not understand the contents of the warning letter. The manager suspended the plaintiff's service on that same day. The plaintiff referred the matter to his union and at their request the union was informed by the defendants that the plaintiff was suspended for insubordination. From then onwards the plaintiff's case was placed in the hands of his solicitors. There were protracted negotiations between the solicitors and the defendants, and later between the union and the defendants. On 21st April, 1965 the defendants served the plaintiff with a written notice of dismissal for insubordination with effect from 8th January, 1965. The manager in his evidence said that he considered the incidents of 6th January, 1965 and 7th January, 1965 sufficient to render the plaintiff guilty of misconduct in his employment in that he disobeyed the lawful and reasonable orders of the defendants.

The question now is to ascertain the reasonable inference to be gathered from the incidents of 6th January, 1965 and 7th January, 1965. To repeat what plaintiff's counsel has speciously urged on his behalf, the only incident (which he submitted is trivial) is the refusal of the plaintiff to sign a copy of the warning letter in acknowledgment. The proposition is sound if the facts justify the inference. In such a case I will gladly accede to counsel's argument that that would be too trivial a matter to justify summary dismissal. In my view, to adopt counsel's argument would be to take the line of least resistance. With all due respect to counsel, I think he attached too much weight to the failure to sign the copy of the warning letter and not enough to the inference to be deduced from all the facts.

The plaintiff, as the estate conductor of his division, is responsible for proper estate management; some of his essential duties are to ensure that the field latex does not pre-coagulate at the factory. He is also required to show diligence in supervising the weighing of latex in the field and to ensure that buckets are free of water. Failure to do that would result in great discrepancies between the latex weighed in the field and at the factory. The warning letter purports to be a final warning to the plaintiff not to be grossly careless and negligent in his duties. In spite of repeated attempts by the defendants, the plaintiff contumaciously refused to acknowledge the said warning, thereby giving rise to the irresistible inference that he refused to mend his ways, that he is adamant against correction, that he refused to remedy an alleged wrong. This is not just a trivial case of ignoring to acknowledge a warning letter. It goes further than that. It goes to the essential conditions of his contract of service, that is, to be a responsible estate conductor. His whole conduct during those two days, if unchecked, might not only result in the low results of latex produced, which would be detrimental to the interests of the defendants, but what is more important is that it conveys the impression that that mutual confidence which is so essential to the relationship between master and servant has been violated. In these circumstances it is idle to say that the conduct of the defendants was arbitrary.

In the light of my findings on the issue of summary dismissal it would now be supererogatory to determine the question of proper notice.

The plaintiff's case is dismissed with costs.

Claim dismissed.

Solicitors: *S. Seenivasagam & Sons; Shearn, Delmore & Co.*

RE TAN SAW GAN DECD.; YEO CHOON HOOI v. YEO SEIW GNOH & ORS.

[O.C.J. (MacIntyre J.) July 21, 1967]

[Penang — Originating Summons No. 173 of 1966]

Will — Construction — Inconsistent clauses — Parts irreconcilable — Rule of interpretation — Intention of testator — Meaning of 'absolutely' in the context — Probate and Administration Ordinance, 1959, s. 69(3).

A testatrix died possessed of immovable property as well as movables including cash in the house and in the bank. Under certain clauses of her will she devised certain lands and bequeathed cash to certain persons and under a later clause 9 of the same will she devised all her immovable property and residue of her movables to her brother-in-law, the plaintiff herein, whom she appointed executor and trustee. The plaintiff was in doubt as to the intentions of the testatrix, whether or not she intended that he should be the sole legatee under the will in respect of all her immovable property devised to him in fee simple and also of the residue of her movable property bequeathed to him absolutely under clause 9 of her will. It was quite apparent that clause 9 was irreconcilable with the preceding clauses of the will.

An application was therefore, made by him as executor and trustee seeking an order to determine the effect of clause 9 upon the disposition of property provided under the other clauses of the will. The court was asked to determine:— (a) whether clause 9 operated to revoke or defeat the previous bequests contained in the preceding clauses; (b) whether clause 9 was to prevail over the other clauses in the will subsequent to and following after clause 9; (c) what was to become of the money left behind by the testatrix.

Held: (1) clause 9 did not operate to revoke or defeat the devises contained in the preceding clauses of the will;

(2) in this case since a gift to the trustee was not intended, the question of clause 9 prevailing over the subsequent clauses did not arise;

(3) since effect was being given to the preceding clauses in the will, the pecuniary legacies, funeral expenses and cost of tombstone should be met from the money she left behind before the residue implied in clause 9 could arise for disposition as therein laid down in that clause. This interpretation would be in accord

with the distribution of assets in a solvent estate as prescribed in section 69(3) of the Probate and Administration Ordinance, 1959.

Cases referred to:—

(1) *Ulrich* v. *Lichfield* 26 E.R. 625, 626.

(2) *Sims* v. *Doughty* 31 E.R. 567, 569.

(3) *Re Gare decd.; Filmer & Anor.* v. *Carter & Ors.* [1952] Ch. 80, 83.

(4) *Roe d. Snape* v. *Nevill* (1848), 11 Q.B. 466.

(5) *In re Rees; Williams* v. *Hopkins & Ors.* [1950] Ch. 204, 208.

ORIGINATING SUMMONS.

Lim Kean Chye for the plaintiff.

A. P. Godwin for the defendants.

Cur. Adv. Vult.

MacIntyre J.: This is an application by the executor and trustee appointed under the last will and testament of Madam Tan Saw Gan, deceased, for an order determining the effect of clause 9 of the said will upon the disposition of property under the other clauses of the will.

The testatrix in this case died possessed of immovable property as well as movables including cash in the house amounting to $1,000 and cash in the bank amounting to $9,215.64. Direction is also sought for in this application as to the manner in which these sums should be disposed of.

Probate of the will was granted to the executor and trustee, Dr. Yeo Choon Hooi, the plaintiff herein, who is a brother-in-law of the testatrix and a legatee.

Under clause 2 of the will the executor and trustee is directed to expend a sum not exceeding $5,000 for funeral expenses and the cost of erecting a tombstone. Under clause 4 certain sums in cash totalling $6,000 are bequeathed to 5 persons including a sum of $2,000 to the executor, personally. Under clauses 5, 6, 7 and 8, certain immovable properties are devised to the various legatees mentioned therein. All, save one, of the directions contained in these clauses are capable of performance. The exception is the devise under clause 7 of land known as lot 531 T.S. 12 N.E.D. Penang together with a house erected thereon bearing No. 35 Malacca Street, to Yeo Siew Gnoh for life and thereafter to Lee Cheng Seong absolutely. The property in question belongs to the aforesaid Yeo Siew Gnoh and is mortgaged to the testatrix for $11,000. This legacy therefore fails.

The controversial clause 9 reads as follows:—

"I devise all my immovable property and I bequeath all the residue of my movable property as follows:

(a) As to immovable property to my trustee in fee simple.

(b) As to movable property to my trustee absolutely.

And I direct my trustee to sell call in and convert into money all such parts of my immovable and movable properties as shall not consist of money."

Under clause 10 of the will the testatrix directs the executor and trustee to invest the proceeds of the said calling in and conversion after paying therefrom debts, estate duty, legacies, funeral and testamentary expenses, and to stand possessed of such investments upon certain trusts and to eventually distribute the residuary estate among certain legatees.

The plaintiff in this originating summons who is the trustee appointed under the will appears to be in doubt as to whether or not the testatrix intended that he should be the sole legatee under the will in respect of all her immovable property devised to him in fee simple and the residue of her movable property bequeathed to him absolutely under clause 9 of the will.

It is in this context that this court is now being asked to determine:—

(a) Whether clause 9 of the said will operates to revoke or defeat the previous bequests contained in the preceding clauses.

(b) Whether clause 9 is to prevail over the following clauses of the will.

At the hearing of the application, Mr. Lim Kean Chye for the plaintiff submitted that the word "bequests" in prayer (a) should be read as "devises" as clause 9 did not affect the pecuniary legacies bequeathed under clause 2 of the will in respect of which the trustee is one of the legatees. His contention in regard to prayer (a) is based on the principle that where a will is inconsistent in itself in that it contains two irreconcilable clauses, then the latter should prevail as conveying the last wish of the testator. And in regard to prayer (b) he submitted that if the court held that the disposition under clause 9 prevailed over the legacies under the previous clauses, then the court would have to consider whether it prevailed over subsequent clauses.

The principle regarding the latter of two inconsistent clauses prevailing was stated by the Lord Chancellor in *Ulrich* v. *Lichfield* (1) in the following words:—

"In the case of a simple legacy, if a man makes a will and gives a horse to A in the first part and in the latter end of it gives the same horse to B it is a revocation of the former legacy. . . ."

This rule is, however, subject to the qualification that where the second legacy is not in accord with the general intent of the testator, then the first would prevail. This latter rule was enunciated by Sir R. Arden M.R. in his judgment in *Sims* v. *Doughty* (2) and I quote:—

"The will, upon which this suit arises, is almost incomprehensible, and perfectly inconsistent with itself. The question is only, which of the testator's meaning it is my duty to adopt. The rule with regard to cases of

this sort is, if upon a general view of the will I can collect the general intention, or any one particular object, and there are expressions in the will in some degree militating with it, if I plainly see, those expressions are inserted by mistake; I may reject them. But I cannot reject any words, unless it is perfectly clear, they were inserted by mistake; and if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention. The court is in a dilemma; and cannot act at all, unless they do that."

In *Re Gare, deceased; Filmer & Anor.* v. *Carter & Ors.*,[3] Harman J. expressed the same view and said as follows:—

"It has been contended that this is a case to which the rule that the latter of two inconsistent phrases, bequests or devises in a will must be preferred to the former applies. No doubt that the rule exists. It is, however, like a similar but converse rule applying to deeds, only as a counsel of despair, and will be resorted to by the court only where there is absolute inconsistency from which there is no way out. Where two phrases, bequests or devises cannot be reconciled, the court will naturally follow that rule to give effect to the whole document."

To quote *Halsbury*, Volume 39 (3rd Edition) pages 973-974:—

"The only principle of construction which is applicable without qualification to all wills, and overrides every other rule of construction, is that the intention of the testator is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and every part of it is determined according to that intention."

There can be no dispute that on the face of it clause 9 is totally irreconcilable with the preceding clauses as the testatrix having purported to devise certain lands to certain persons under clauses 5 to 8, devises under clause 9 all her immovable property to the trustee in fee simple. However, her intention to make the gifts under the preceding clauses is expressed in no uncertain terms. In such circumstancecs, the rule is that the general gift is confined to the residue of the property. The following passage from *Halsbury*, Volume 39 (3rd Edition) at page 980 is relevant and I quote:

"The rule, that the later gift prevails, is only used as a last resort when all attempts to reconcile the various provisions of the will have failed; and it is subject to the rule that a prior title should not be disturbed further than is necessary for the purpose of giving effect to the later disposition. Accordingly, if there are two absolute gifts one of all the testator's property or all his property of a certain description, and the other of portions of that property, the more general gift is confined to the residue of that property."

The authority for this last proposition is to be found in *Roe d. Snape* v. *Nevill.*[4]

However, in my opinion, the disposition of property under clause 9 is not a gift at all. The will was prepared by professional experts. Having regard to the provisions made in the preceding and succeeding clauses the only reasonable interpretation possible in regard to the devises and bequests made thereunder is that the properties were conveyed to the trustee upon trust. The mere omission of the words "upon trust" from sub-clauses (a) and (b) of clause 9 does not necessarily mean that the intention was not to convey the property upon trust. In Precedent No. 235 on page 1029 of *Williams* on Wills (2nd Edition) the words "upon trust" are omitted. Again the conveyance of the immovable property to the trustee "in fee simple" and the movable property "absolutely" should not be construed as conferring a beneficial interest. The words are meant to indicate the extent of the interest in the property given. That was how the word "absolutely" was construed by Evershed M.R. in *In re Rees; Williams* v. *Hopkins & Ors.*[5] The relevant passage in his judgment reads as follows:—

"The first thing I note about this will is that, far from being an untechnical document, it is quite manifestly a lawyer's document. The whole language of it shows, and it is, of course, plainly the fact, that it was prepared professionally by a lawyer; and the language from first to last is the technical language of the lawyer. Then we come, secondly, to the use in that context of the word 'absolutely' in reference to which I have made the citation from Sargant J. I think that in this context, and in this will, the word 'absolutely' should be construed not as conferring a beneficial interest but as defining the extent of the interest in the property given, so as to confer upon the trustees the property given to them — and I borrow the language used by Cohen L.J. during the argument — free of any fetter which would prevent their carrying out his express wishes."

In the present case I do not think it necessary to consider the meaning of technical terms in order to ascertain whether the testatrix wished to convey the property in trust or beneficially under clause 9. Why should she direct the trustee "to sell call in and convert into money" all such parts of her immovable and movable properties as shall not consist of money, if she had intended to make a gift of the property to the trustee?

My answer then to the question posed in prayer (a) of this originating summons is that clause 9 does not operate to revoke or defeat the devises contained in the preceding clauses. As for prayer (b) the question of clause 9 prevailing over the following clauses does not arise, since a gift to the trustee was not intended. Under prayer (c) the court is asked to determine what is to become of the money left behind by the testatrix. The sum amounts to $10,215.64. Under clause 9, the testatrix bequeaths "All the residue of her moveable property." These words imply that she had already made a disposition of a part of her movable property under the preceding clauses of the will. It would appear as if she intended that the pecuniary legacies under clause 4 and the funeral expenses and cost of erecting a tombstone should be met from this amount as far as it could go. This interpretation would be in accord with the rules for the application of assets in a solvent estate. Reading section 69(3) of the Probate and Administration Ordinance No. 35 of 1959 with rule 1 of Part II of the First Schedule to the Ordinance,

it would appear that in a solvent estate the undisposed of property should be applied for the payment of funeral, testamentary and administration expenses, debts and liabilities, subject to the retention of a fund sufficient to meet pecuniary legacies.

Order accordingly.

Solicitors: *Lim Cheng Ean & Co.; Donaldson & Burkinshaw.*

CHNG KOK TOW v. PUBLIC PROSECUTOR

[A.Cr.J. (Ali J.) July 27, 1967]

[Johore Bahru — Criminal Appeal No. 2 of 1966]

Road Traffic — Using a car for carrying goods without carrier's licence — Failure to prove goods carried for trade or business — Using vehicle without third party cover in respect of that user — Necessity for some prima facie evidence before onus under s. 106 Evidence Ordinance, 1950, can shift on accused — Road Traffic Ordinance, 1958, ss. 74(1) & 98(1).

The appellant while driving his motor car with luggage boot filled with vegetables and marine products was stopped by police constables and taken to the police station, where a report was made and a photograph of the car taken. He was charged with (a) using the motor contrary to section 98(1) of the Road Traffic Ordinance; (b) using the motor car without there being in force in relation to such user third party insurance contrary to section 74(1) of the same Ordinance. At the trial the photograph of the car taken at the police station was not produced. The learned magistrate called upon the appellant for his defence and convicted him on both charges.

Held: (1) there was no evidence to suggest that the goods were carried for purposes of trade or business. No *prima facie* case was made out against appellant and he should not have been called upon for his defence on this charge;

(2) on the 2nd charge, although the subject matter of this charge was something within the knowledge of the appellant, it was necessary for the prosecution to adduce *prima facie* evidence before the onus by virtue of section 106 Evidence Ordinance would shift to the appellant.

Cases referred to:—

(1) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 112.

(2) *Re Tan Kheng Cheng* [1962] M.L.J. 310.

(3) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146.

CRIMINAL APPEAL.

H. L. Tennakoon for the appellant.

Tunku Zaid (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ali J.: This is an appeal from the decision of the learned magistrate, Johore Bahru, who convicted the appellant on two charges for offences under the Road Traffic Ordinance, 1958.

The first charge was in respect of an offence of using a motor car for the carriage of goods without a carrier's licence contrary to section 98(1) of the Ordinance, and the second charge was in respect of an offence of using the said motor car without there being in force in relation to such user a third party insurance contrary to section 74(1) of the same Ordinance.

The prosecution evidence established that on 26th June, 1965, at about 8.20 a.m. the appellant, while driving a motor car, was stopped by two police constables. In the luggage boot of the car was found a fairly large quantity of vegetables and some marine products. The appellant was brought to the police station where a report was made and a photograph of the car taken. For some reason or other, which is not clearly stated in the record, this photograph, which might lend some weight to the prosecution case, was not produced. Although the report made mention of the weight of the various items of vegetables and marine products found in the car, it did not appear that the constable, who made the report, had in fact properly weighed the articles. It is apparent from the grounds of decision of the trial magistrate that he regarded the quantity of goods to be large having regard to the evidence that the luggage boot was ajar and could not be closed. Quite apart from this, however, there was nothing in the evidence for the prosecution to suggest that the goods were for the purposes of trade or business. The word "goods" is defined in section 2 of the Ordinance to include "anything . . . . carried on or in a motor vehicle for the purposes of any trade or business . . . ." In terms of this definition it was incumbent on the prosecution in order to establish a charge under section 98(1) of the Ordinance to prove not only that the car was used for the carriage of goods but that the goods carried were for purposes of trade or business. Notwithstanding the lack of evidence that the goods were for purposes of trade or business the trial magistrate at the close of the prosecution case held that a *prima facie* case had been made out against the appellant not only on the 1st charge but also on the 2nd charge. The appellant gave evidence in his defence.

In a criminal prosecution, the burden of proving the guilt of an accused person lies with the prosecution and this burden never shifts. In terms of this principle it has time and again been stated in the courts of this country that an accused person is presumed innocent until he is proved guilty. In summary trials, therefore, before calling on an accused person for his defence it is necessary for the trial magistrate to be satisfied that the prosecution's evidence has disclosed a reasonable presumption of guilt against the accused. Having thus stated the principle I shall now proceed to deal with the case under review.